



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 20, 2005

Mr. Russell Wilson, II
Attorney at Law
350 North St. Paul, Suite 1600
Dallas, Texas 75201-4240

OR2005-03422

Dear Mr. Wilson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 222497.

Evolution Academy Charter School (the "school"), which you represent, received a request for 1) the name of the attorney and/or law firm that represented the school in a specified special education due process hearing, 2) the total amount paid to the attorney and/or law firm referred to in request category one, 3) the total amount paid to any attorney and/or law firm representing the school in a civil action in state or federal court to appeal the decision in the specified due process hearing, 4) the total amount of attorney's fees and/or costs, if any, paid to the attorney representing the parent and/or child in the specified due process hearing, and 5) the total amount of attorney's fees and/or costs, if any, paid to the attorney representing the parent and/or child in the civil action in state or federal court to appeal the decision in the specified due process hearing. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5. We have considered your arguments and reviewed the submitted information.¹

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we discuss your contention that the school is not required to respond to the instant request because it asks a governmental entity to provide answers to fact questions. The Public Information Act (the "Act") does not require that a governmental body perform legal research or answer questions. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Nor does the Act require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 572 at 1 (1990), 452 at 2-3 (1986), 416 at 5 (1984), 342 at 3 (1982), 87 (1975); *Econ. Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed). However, a governmental body must make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990). Thus, the fact that a request for information appears to seek answers to fact questions does not necessarily relieve the governmental body of its responsibility to make a good faith effort to identify information that is responsive to the request. In this instance, we find that the instant request is sufficiently specific to enable the school to identify any responsive information that is within the school's possession or control. *See also* Open Records Decision No. 483 at 2 (1987) (stating that the Act requires no particular request form or "magic words"). Further, we note that the school has already made a good faith effort to relate the request to information in its possession by submitting a representative sample of responsive information. Accordingly, we will address your arguments for the submitted documents.

Next, we note that the submitted information is subject to section 552.022 of the Government Code. This section provides in part that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

....

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(3), (16). Because the submitted information consists of a voucher relating to the expenditure of public funds and an attorney fee bill, the school must release this information under section 552.022 unless it is expressly confidential under other law.

You seek to withhold the submitted information under section 552.101 of the Government Code and the Texas Rules of Evidence and Civil Procedure. Section 552.101 constitutes

“other law” for the purposes of section 552.022 of the Government Code. Further, the Texas Supreme Court has held that the Texas Rules of Evidence and Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is found at Rule 503 of the Texas Rules of Evidence and the attorney work product privilege is found at Rule 192.5 of the Texas Rules of Civil Procedure. Accordingly, we will consider your claims under these provisions.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Section 1417(c) of the Education of Individuals with Disabilities Act, 20 U.S.C. § 1400 *et seq.*, provides that:

[the Secretary of Education] shall take appropriate action, in accordance with the provisions of section 1232g of this title, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by State and local educational agencies pursuant to the provisions of this subchapter.

Section 1232g of title 20 of the United States Code, the Family Educational Rights and Privacy Act of 1974 (“FERPA”), provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student’s education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. *See* 20 U.S.C. § 1232g(b)(1). “Education records” means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Section 300.571 of title 34 of the Code of Federal Regulations, providing regulations for the administrations of the Education of Individuals with Disabilities Act, further provides that parental consent must be obtained before personally identifiable information may be disclosed.

This office generally applies the same analysis under section 552.114 of the Government Code and FERPA.² Open Records Decision No. 539 (1990).

Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in

²The Office of the Attorney General will raise a mandatory exception like section 552.114 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Information must be withheld from required public disclosure under FERPA only to the extent “reasonable and necessary to avoid personally identifying a particular student.” *See* Open Records Decision Nos. 332 (1982), 206 (1978). We have marked the submitted information that may reveal or tend to reveal information about a student that must be withheld pursuant to FERPA.

We now address your claims under the attorney work product and attorney-client privileges for the remainder of the submitted information. For the purpose of section 552.022, information is confidential under Rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. Open Records Decision No. 677 at 9-10 (2002). Core work product is defined as the work product of an attorney or an attorney’s representative developed in anticipation of litigation or for trial that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. *Id.* The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See Nat’l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204. The second prong of the work product test requires the governmental body to show that the documents at issue contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that “the requested information may be excepted from disclosure based on ... [t]he Texas Rules of Evidence [r]egarding Attorney Work Product.” However, you make no further assertions, arguments, or demonstrations that the submitted information qualifies as core work product information. As such, we cannot find that any of the submitted information falls within Rule 192.5 of the Texas Rules of Civil Procedure.

Rule 503(b)(1) of the Texas Rules of Evidence provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. TEX. R. EVID. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* Open Records Decision No. 676 (2002). Upon a demonstration of all three factors, the entire communication is confidential under Rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (Privilege attaches to complete communication, including factual information). You state that some of the requested information may fall within the attorney client privilege. We have

marked the privileged attorney-client information in the submitted fee bills that may be withheld under Rule 503 of the Texas Rules of Evidence.

Although you state that the requested information may be excepted under “[t]he Texas Family Code provision regarding Juvenile Justice,” you have not sufficiently demonstrated, nor is it apparent from the face of the submitted documents, what provision of the Family Code is applicable to the information at issue. Accordingly, you may not withhold the information on these grounds.

The submitted information contains a bank account number. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The school must, therefore, withhold the marked bank account number under section 552.136.³

In summary, the school must withhold the identifying information relating to a student that we have marked under section 552.101 of the Government Code and FERPA. You must also withhold the marked bank account number under section 552.136 of the Government Code. You may withhold the privileged attorney-client information we have marked under Rule 503 of the Texas Rules of Evidence. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body

³Like section 552.114 of the Government Code, section 552.136 is a mandatory exception that this office will raise on a governmental body’s behalf. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

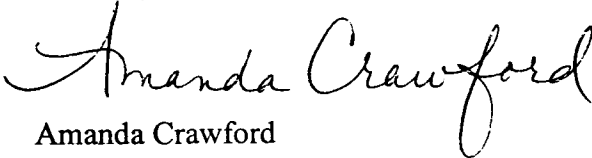
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Amanda Crawford". The signature is written in black ink and is positioned above the printed name and title.

Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/sdk

Ref: ID# 222497

Enc. Submitted documents

c: Mr. Richard LaVallo
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(w/o enclosures)